

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>THOMAS GREEN</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>BOEING COMPANY</b>	)	
Respondent	)	Docket No. 251,815
	)	
AND	)	
	)	
<b>INSURANCE CO. STATE OF PA.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier appealed Administrative Law Judge Jon L. Frobish's Award dated August 9, 2002. The Board heard oral argument on February 21, 2003.

**APPEARANCES**

Joseph Seiwert of Wichita, Kansas, appeared for the claimant. Kirby A. Vernon of Wichita, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award except for the stipulated average weekly wage. The Award lists the stipulated average weekly wage as \$556.67, however, at regular hearing the parties stipulated the claimant's average weekly wage was \$566.67.<sup>1</sup> Accordingly, the correct stipulated average weekly wage is \$566.67. The parties also stipulated the value of claimant's fringe benefits was \$94.80.

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<sup>1</sup> R.H. Trans. at 4.

### ISSUES

The Administrative Law Judge (ALJ) found the claimant sustained a 50.5 percent work disability based on a 50 percent task loss and a 51 percent wage loss.

The sole issue raised on review by the parties is the nature and extent of claimant's disability.

Respondent argues the claimant was terminated for violating respondent's conduct policies. Because claimant was making a comparable wage at an accommodated position when terminated, the respondent argues claimant is not entitled to a work disability. Respondent concludes claimant should be entitled to a 13 percent permanent partial functional impairment based on Dr. Philip R. Mills' testimony.

Claimant argues that his termination was made in bad faith by respondent because when he left work, due to pain from his injury, he had notified a lead worker as required by respondent's policy. Therefore, it was inappropriate for respondent to consider his absence as unexcused. Consequently, claimant argues he is entitled to a work disability and he further argues the task loss component of the work disability formula should be 91.7 percent.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's Award contains pertinent findings of fact and conclusions that are accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board adopts those findings and conclusions as its own to the extent that they are not inconsistent with the findings and conclusions expressed herein.

It is undisputed claimant suffered a work-related injury on December 9, 1999. The issue raised on review by respondent is the nature and extent of disability. Specifically, the respondent argues claimant should be limited to his functional impairment because he was terminated for violation of respondent's conduct policies.

While claimant was receiving treatment for his back injury the claimant testified that on March 28, 2000, because of pain from his back injury, he was unable to perform the job he had been assigned. After a discussion with his former supervisor, Mr. Vaughn, and his new supervisor of one day, Mr. Seals, it was agreed the work would be modified to accommodate claimant's temporary restrictions. But as he continued working the claimant's pain increased to the point where he could not continue to work. Because

neither Mr. Seals nor the lead worker were in the area, the claimant told a co-worker, who is the lead when the regular lead is absent, that he was leaving.

As claimant proceeded to his locker he met his former supervisor, Mr. Vaughn, and told him he was leaving. Mr. Vaughn thought that after claimant told him he was leaving, Mr. Vaughn had then relayed the message to claimant's supervisor that claimant had left.

Claimant had received a Corrective Action Memo on December 20, 1999, which indicated that if claimant had any policy violations of any kind within a 12-month period, such unacceptable conduct would be grounds for dismissal. Claimant was also told to tell his supervisor or a lead person if he needed to leave his work site early. Respondent concluded claimant had failed to properly advise his supervisor, lead or manager that he was leaving on March 28, 2000, and consequently he was given a Corrective Action Memo. Because this was claimant's sixth corrective action memo in a 12-month period the claimant was terminated on April 4, 2000.

After his termination from employment, the claimant continued to receive medical treatment and ultimately he had a discectomy and fusion with the implantation of a titanium cage at the L4-L5 level of his lumbar spine. Unfortunately, the surgery did not alleviate the claimant's pain and additional treatment consisting of pain management was provided. Implantation of a morphine pump was recommended but declined by claimant.

Claimant was examined by Dr. Pedro A. Murati at his attorney's request on February 7, 2001. He diagnosed low back pain secondary to failed back surgery syndrome. The doctor restricted claimant to sedentary activity with a 10 pound occasional maximum lift. Based upon the AMA *Guides*<sup>2</sup>, the doctor placed claimant in the lumbosacral DRE Category V for a 25 percent permanent partial whole person functional impairment.

Claimant was examined by Dr. Philip R. Mills at respondent's request on May 16, 2002. He diagnosed claimant with chronic back pain syndrome. The doctor restricted claimant from lifting greater than a maximum of 50 pounds and noted that claimant should change positions on an as needed basis, avoid repetitious or prolonged lumbosacral flexion and use good body mechanics. Based on the AMA *Guides*, Dr. Mills opined the claimant would be placed in the lumbosacral DRE Category III which is a 10 percent permanent partial impairment to the body. In addition, claimant would have a 3 percent permanent partial impairment for chronic pain. Using the combined value chart, claimant would have a 13 percent permanent partial impairment to the body as a whole.

The Board finds claimant has a 19 percent permanent partial functional impairment as a result of his work-related injury on December 9, 1999.

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<sup>2</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

Claimant contends his termination was not in good faith. In support of this argument is the *Guerrero*<sup>3</sup> case. In that case the claimant made a good faith effort to perform an accommodated job that was within her restrictions but which caused her pain. She was terminated but was still eligible to receive a work disability award. Also, in *Niesz*<sup>4</sup> the Court found that where a claimant's termination was not made in good faith because respondent inadequately investigated the facts relating to the termination there could still be an award of work disability. "Once an accommodated job ends, the presumption of no work disability may be rebutted."<sup>5</sup>

The ALJ concluded the claimant's termination was not made in good faith. The ALJ noted:

The Claimant argues he is entitled to a work disability while the Respondent counters the Claimant is not entitled to a work disability because his termination was as a result of the Claimant's improper actions. This issue was taken up at a preliminary hearing on May 25, 2000. At that time, the court concluded the termination was improper as it relates to Workers Compensation and awarded temporary total disability. While there certainly is a good argument to be made that the Claimant could have made a better attempt to contact his supervisor, there is also a great deal of confusion even from Respondent's witnesses and their documentation as to who the Claimant's supervisor was at any particular time. The fact remains that the Claimant's testimony that he reported the matter to his co-employee, Gary, remains unrefuted. Testimony is also unrefuted that Gary takes the place of the lead man if both the lead man and the supervisor are absent. This is not a question of misconduct on the part of the Claimant unrelated to his Workers Compensation claim, this is conduct directly related to his Workers Compensation claim in that he was claiming he left because of the pain from his accidental injury. The Court finds the Claimant is entitled under these facts to a work disability.<sup>6</sup>

The Board agrees with the ALJ's analysis. The Board agrees that the test of whether a termination disqualifies an injured worker from entitlement to a work disability remains one of good faith, on the part of both claimant and respondent.<sup>7</sup> Here, the Board concludes, as did the ALJ, that respondent wrongfully terminated the claimant for failing to advise a supervisor or lead worker that he was leaving the workplace. Claimant's testimony was uncontradicted that he was told to tell the supervisor or lead person if he

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<sup>3</sup> *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

<sup>4</sup> *Niesz v. Bill's Dollar Stores*, 26 Kan. App.2d 737, 993 P.2d 1246 (1999).

<sup>5</sup> *Niesz* at Syl. ¶ 2.

<sup>6</sup> Award at 3.

<sup>7</sup> See *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001) and *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

needed to leave. It was further uncontradicted that claimant told the co-worker who acted as the lead person when the lead person was absent. Moreover, as claimant went to his locker, he also told his former supervisor that he was leaving. The Board concludes claimant is entitled to a work disability because he was not terminated for misconduct as held in *Ramirez*.<sup>8</sup> But, instead, the Board finds that respondent's termination of claimant was not made in good faith as found in *Niesz*.<sup>9</sup>

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e, which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*<sup>10</sup> and *Copeland*.<sup>11</sup> In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-

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<sup>8</sup> *Ramirez v. Excel Corp.*, 26 Kan. App.2d 139, 979 P.2d 1261, rev. denied 267 Kan. 889 (1999).

<sup>9</sup> *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, Syl. ¶ 2, 993 P.2d 1246 (1999).

<sup>10</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

<sup>11</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .<sup>12</sup>

Although claimant testified that he continues to look for work, he did not provide a detailed listing of where he had attempted to obtain employment. The ALJ concluded claimant failed in his burden of proof to establish he made a good faith effort to find employment. Accordingly, the ALJ imputed a wage of \$8 per hour based upon the opinions offered by the vocational experts. The Board agrees and affirms. However, this would compute to an average weekly wage of \$320 per week and when compared to claimant's \$661.47 average weekly wage, including fringe benefits, computes to a 52 percent wage loss.

Dr. Mills opined the claimant sustained an 18 percent task loss based on Ms. Terrill's task loss report. But the doctor noted there was a discrepancy between the claimant's description of his tasks versus the respondent's and based upon the differences in the descriptions, Dr. Mills opined the claimant had a 15 percent task loss. Conversely, Dr. Murati opined the claimant sustained a 91.7 percent task loss based on Mr. Molski's task list. The Board concludes claimant's task loss is somewhere in the range of 15 to 91.7 percent and finds claimant has a 53 percent task loss.

Averaging the 52 percent wage loss with the 53 percent task loss results in a 52.5 percent work disability. Consequently, the Board modifies the ALJ's Award to reflect claimant has suffered a 52.5 percent work disability.

### **AWARD**

**WHEREFORE**, it is the finding, of the Board that the Award of Administrative Law Judge Jon L. Frobish dated August 9, 2002, is modified to reflect claimant suffered a 52.5 percent work disability.

The claimant is entitled to 97.26 weeks of temporary total disability compensation at the rate of \$383 per week or \$37,250.58 followed by permanent partial disability

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<sup>12</sup> *Id.* at 320.

compensation at \$383 per week for a total award not to exceed \$100,000 for a 52.5 percent permanent partial general bodily disability.

As of October 10, 2003, there would be due and owing to the claimant 97.26 weeks of temporary total disability compensation at \$383 per week in the sum of \$37,250.58 plus 103.03 weeks of permanent partial disability compensation at \$383 per week in the sum of \$39,460.49 for a total due and owing of \$76,711.07 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance of \$23,288.93 shall be paid at \$383 per week until fully paid or until further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant  
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier  
Jon L. Frobish, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director